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Paper No. 8

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MAILED

SEP 30 2010

OFFICE OF PETITIONS

In re Patent No. 6,289,896 :
Glennah Hart :
Issue Date: September 18, 2001: DECISION ON PETITION
Application No. 09/470,756 :
Filed: December 23, 1999 :
Attorney Docket No. 99-0740 :

This is a decision on the PETITION TO ACCEPT UNAVOIDABLY DELAYED PAYMENT OF MAINTENANCE FEE IN AN EXPIRED PATENT (37 CFR 1.378(b)), filed October 29, 2009. This also responds to the PETITION TO ACCEPT UNINTENTIONALLY DELAYED PAYMENT OF MAINTENANCE FEE IN AN EXPIRED PATENT (37 CFR 1.378(c)) filed September 13, 2010.

The petition under 37 CFR 1.378(b) is dismissed.

The petition under 37 CFR 1.378(c) is granted.

The patent issued September 18, 2001. The grace period for paying the 7-½ year maintenance fee expired at midnight on September 18, 2009, with no payment received.

The petition under 37 CFR 1.378(b) includes payment of the second maintenance fee (\$1240), the surcharge of \$700 and a statement in support of petition. (No \$65 surcharge is required). The petition under 37 CFR 1.378(c) includes the required statement of unintentional delay. The deficiency in surcharge of \$875 (used with the unnecessary \$65 surcharge) required to pay the full unintentional surcharge of \$1,640 was submitted on August 19, 2010.

ON PETITION UNDER 37 CFR 1.378(b)

STATUTES, RULES AND REGULATIONS

35 U.S.C. § 41(c)(1) states that:

The Director may accept the delayed payment of any maintenance fee required ... after the six month grace period if the delay is shown to the satisfaction of the Director to have been unavoidable.

37 C.F.R. §1.378(b) provides that:

Any petition to accept an unavoidably delayed payment of a maintenance fee must include:

(1) The required maintenance fee set forth in §1.20(e) through (g);

(2) The surcharge set forth in §1.20(I)(1); and

(3) A showing that the delay was unavoidable since reasonable care was taken to ensure that the maintenance fee would be paid timely and that the petition was filed promptly after the patentee was notified of, or otherwise became aware of, the expiration of the patent. The showing must enumerate the steps taken to ensure timely payment of the maintenance fee, the date and the manner in which patentee became aware of the expiration of the patent, and the steps taken to file the petition promptly.

Acceptance of a late maintenance fee under the unavoidable delay standard is considered under the same standard for reviving an abandoned application under 35 U.S.C. 133. Decisions on reviving abandoned applications on the basis of "unavoidable" delay have adopted the reasonably prudent person standard in determining if the delay was unavoidable:

The word 'unavoidable' ... is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business.

In re Mattullath, 38 App. D.C. 497, 514-15 (1912) (quoting Ex parte Pratt, 1887 Dec. Comm'r Pat. 31, 32-33 (1887)); see also Winkler v. Ladd, 221 F. Supp. 550, 552, 138 U.S.P.Q. 666, 167-68 (D.D.C. 1963), aff'd, 143 U.S.P.Q. 172 (D.C. Cir. 1963); Ex parte Henrich, 1913 Dec. Comm'r Pat. 139, 141 (1913). However, a petition cannot be granted where a petitioner has failed to meet his or her burden of establishing that the delay was

"unavoidable." Haines v. Quigg, 673 F. Supp. 314, 316-17, 5 USPQ2d 1130, 1131-32 (N.D. Ind. 1987).

A delay resulting from an error (e.g., a docketing error) on the part of an employee in the performance of a clerical function may provide the basis for a showing of "unavoidable" delay, provided it is shown that:

- (1) the error was the cause of the delay at issue;
- (2) there was in place a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance; and
- (3) the employee was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such employee represented the exercise of due care.

See MPEP 711.03(c)(III)(C)(2) (See also In re Egbers, et al., 6 U.S.P.Q.2d 1869 (Commr. Pat. 1988), rev'd on other grounds sub nom, Theodor Groz & Sohne & Ernest Bechert Nadelfabrik KG v. Quigg, 10 U.S.P.Q.2d 1787 (D.D.C. 1988); In re Katrapat, AG, 6 U.S.P.Q.2d 1863 (Commr. Pat. 1988).

OPINION

A maintenance fee and any necessary surcharge for a patent must be submitted in the amount due on the date the maintenance fee and any necessary surcharge are paid, and at the proper time, i.e., within the periods set forth in 37 CFR 1.362.

37 CFR 1.6. Receipt of correspondence.

(a) Date of receipt and Express Mail date of deposit. Correspondence received in the Patent and Trademark Office is stamped with the date of receipt except as follows:

(1) The Patent and Trademark Office is not open for the filing of correspondence on any day that is a Saturday, Sunday, or Federal holiday within the District of Columbia. Except for correspondence transmitted by facsimile under paragraph (a)(3) of this section, or filed electronically under paragraph (a)(4) of this section, no correspondence is received in the Office on Saturdays, Sundays, or Federal holidays within the District of Columbia.

(2) Correspondence filed in accordance with § 1.10 will be stamped with the date of deposit as "Express Mail" with the United States Postal Service.

(3) Correspondence transmitted by facsimile to the Patent and Trademark Office will be stamped with the date on which the complete transmission is received in the Patent and Trademark Office unless that date is a Saturday, Sunday, or Federal holiday within the District of Columbia, in which case the date stamped will be the next succeeding day which is not a Saturday, Sunday, or Federal holiday within the District of Columbia.

(4) [Reserved].

37 CFR 1.8 further provides, Certificate of mailing or transmission.

(a) Except in the situations enumerated in paragraph (a)(2) of this section or as otherwise expressly excluded in this chapter, correspondence required to be filed in the U.S. Patent and Trademark Office within a set period of time will be considered as being timely filed if the procedure described in this section is followed. The actual date of receipt will be used for all other purposes.

(1) Correspondence will be considered as being timely filed if:

(i) The correspondence is mailed or transmitted prior to expiration of the set period of time by being:

(A) Addressed as set out in § 1.1(a) and deposited with the U.S. Postal Service with sufficient postage as first class mail; or

(B) Transmitted by facsimile to the Patent and Trademark Office in accordance with § 1.6(d); and

(ii) The correspondence includes a certificate for each piece of correspondence stating the date of deposit or transmission. The person signing the certificate should have reasonable basis to expect that the correspondence would be mailed or transmitted on or before the date indicated.

In this instance, the period for timely paying the maintenance fee (and surcharge) expired on September 18, 2009. Thus, the maintenance fee payment (and surcharge) would have been considered timely filed if received in the Office on or before September 18, 2009, or if received in the Office after that date with a certificate of mailing pursuant to 37 CFR 1.8 dated on or before September 18, 2009.

Petitioner states that he placed the maintenance fee payment in the mail before the expiration date of September 18, 2009. Petitioner further states that he followed the instructions of a PTO employee, however, that employee failed to advised him of

512 certificate of mailing or transmission (that is, 37 CFR 1.8).

A review of the record confirms that the maintenance fee was received in the Office on Monday, September 21, 2009, three days after the expiration date of September 18, 2009. Further, *pro se* applicant admits that the transmittal did not include a certificate of mailing.

At the same time, *pro se* petitioner has submitted persuasive evidence to show that the cashier's check used to pay the maintenance fee was drawn from his bank account by the teller on September 15, 2009, three days *before* the expiration date. Moreover, the payment presumably mailed from South Carolina by *non-Express* mail was received in the Office on September 21, 2009, the first business day after September 18, 2009.

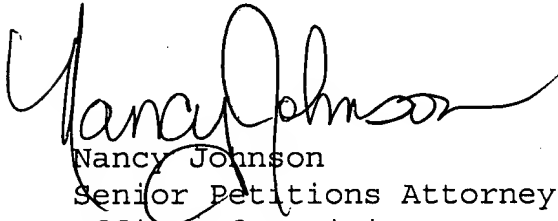
The question remains as to whether petitioner has any further evidence to show that the maintenance fee payment was placed in the mail to the United States Patent and Trademark Office on or before September 18, 2009. Of particular significance would be any documentation created contemporaneously by the USPS, such as an itemized receipt or a delivery confirmation receipt or a USPS certificate of mailing. Absent such evidence or other persuasive showing, it cannot be concluded that petitioner has met his burden of establishing unavoidable delay. In view thereof, the petition under 37 CFR 1.378(b) must be dismissed.

ON PETITION UNDER 37 CFR 1.378(b)

This petition was timely filed within twenty-four months after the expiration of the six-month grace period. As required, petitioner submitted with the petition the required maintenance fee, the surcharge for accepting an unintentionally delayed maintenance fee after expiration, and a statement that the delay in payment of the maintenance fee was unintentional. These fees were accepted at the reduced small entity rate, as the fees were accompanied by petitioner's assertion of having made a determination of continued entitlement to pay small entity fees, pursuant to new 37 CFR 1.27(g)(1), effective September 8, 2000.

Accordingly, the maintenance fee in this case is hereby accepted and the above-identified patent is hereby reinstated as of the mail date of this decision.

Telephone inquiries related to this decision may be directed to the undersigned at (571) 272-3219.



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